Supreme Court of the United States.

No. 139.—October Term, 1904.

The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, Petitioners,
vs.
The Chicago Title & Trust Company, Trustee of Alexander Rodgers, Bankrupt; The National Storage Company, James A. Patten, Frank E. Winans, and E. W. Bailey & Company.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 15, 1905.]

The petition for certiorari represented:

"1. That for some years prior to the 10th day of May, 1901, Alexander Rodgers was a wholesale dealer in seeds in the city of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and the Chicago Title and Trust Company, respondent herein, was duly appointed receiver, and subsequently trustee, of the estate of said bankrupt.

"2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the State of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

'Warrant No. 8401. Lot No. 1.

'The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B. sec. 1, fifth floor, at its warehouse premises No. 281, located at 220–230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of charges and delivery of this warrant, at its office in Chicago, duly endorsed.

'It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

'Storage and charges as per contract on file with this company.

'Chicago, Aug. 31, 1900.'

[Signed by the National Storage Company by its president and treasurer, and the corporate seal affixed.]

"That immediately thereafter said Rodgers endorsed and hypothecated thirteen of said receipts to your petitioner, the First National Bank of Chicago, to secure loans made by it to him aggregating about $12,000, and endorsed and hypothecated five of said receipts to your petitioner, H. W. Rogers & Brother, to secure a loan by them to him of $5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

"3. That on the 13th day of May, 1901, said Chicago Title and Trust Company, as said receiver, filed in said District Court a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said District Court over said seed, and such petitioner, as did also said National Storage Company. That thereupon the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported that the seed covered by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said storage company, that the District Court was without jurisdiction, and recommending a dismissal of said petition.

"That subsequently exceptions to said report were heard by said District Court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner, First National Bank, consenting) that said seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court; that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner, the First National Bank.

"That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. That said Chicago Title and Trust Company, as trustee, and the respondents, James A. Patten, and E. W. Bailey & Company as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court, and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said District Court, and adjudged that said District Court had jurisdiction; that said decree also found that said storage company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to the possession of, said seed, and decreed that petitioner, First National Bank, retain out of said proceeds the sum of $9,854.15 on account of its claim, and pay therefrom to petitioners, H. W. Rogers & Brother, $5,000.

"That thereupon said Chicago Title and Trust Company, as trustee, and said James A. Patten severally perfected appeals from said order or decree to the Circuit Court of Appeals of the Seventh Circuit.

"That thereafter said two appeals were duly filed in said Circuit Court of Appeals, and were there, by order of court, consolidated and heard as one case.

"That said Circuit Court of Appeals thereafter filed its opinion in said consolidated causes reviewing the question of fact whether the storage company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said District Court had erred in deciding this question of fact, and overruled said District Court upon said question of fact, and decided that said storage company was not in possession of said seed, and remanded said cause with directions to enter a decree for said trustee.

"That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied.

"That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said District Court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said Circuit Court of Appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the District Court was null and void.

"That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said Circuit Court of Appeals as in effect petitions for revision, said Circuit Court of Appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the District Court in matter of law, and that said Circuit Court of Appeals, in reversing said District Court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute." . . .

The granting of the writ was objected to, and it was stated that Alexander Rodgers, the bankrupt, filed his petition in bankruptcy May 8, 1901; that the Chicago Title and Trust Company was appointed receiver the same day; and that the bankrupt turned over his property, including the seed in dispute, to the receiver. And it was insisted that the proceeding was a plenary suit, to the institution of which, in the District Court sitting in bankruptcy, the petitioners as adverse parties, had consented. Certiorari was granted, and thereafter a motion to quash the writ was filed on the ground that the matters involved and determined in the cause were controversies arising in bankruptcy proceedings as distinguished from proceedings in bankruptcy, and that the remedy was by error or appeal rather than by certiorari. Consideration of this motion was postponed to the hearing on the merits.

The case in the Circuit Court of Appeals is reported 125 Fed. Rep. 169.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In the view we take of the case, the petition for certiorari sufficiently discloses the facts. If the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law "on due notice and petition" under clause *b* of section 24.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden* v. *Stratton*, 191 U. S. 115; *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Elliott* v. *Toeppner*, 187 U. S. 327, 333, 334.

This distinction existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *In re Bonesteel*, 7 Blatch. 175, Mr. Justice Nelson; *Knight* v. *Cheney*, 14 Fed. Cases 760, Mr. Justice Clifford; *In re Ballou*, 4 Ben. 135, Mr. Justice Blatchford, then District Judge; *In re Marter*, 16 Fed. Cases 857, Mr. Justice Brown, then District Judge.

The present act was plainly framed in recognition of the principle of these cases. Subdivision 7 of section 2 confers jurisdiction on the District Courts as courts of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and we held in *Bardes* v. *Bank*, 178 U. S. 524, that this exception referred to clause *b* of section 23 of the act, which provides: "Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And that the District Courts had no jurisdiction of such plenary suits without consent.

Petitioners asserted this express statutory limitation on jurisdiction and objected that the District Court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested. *Louisville Trust Company* v. *Cominger*, 184 U. S. 18. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying jurisdiction, which the court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon petition for review the Circuit Court of Appeals reversed the bankruptcy court, and this court upon certiorari affirmed the Circuit Court of Appeals. We said:

"This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the State court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. . . .

"The proceeding was purely summary. . . .

"The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. . . .

"In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

"We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

And since, as elaborately expounded in *Bardes* v. *Bank*, the District Court had no jurisdiction of an independent suit, it follows that the proceeding in that court could not be held to have been such, as, indeed, in form, on reason, and on authority, it manifestly was not. But, nevertheless, the District Court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18; *Mueller* v. *Nugent*, Id. 1; *Schweer* v. *Brown*, 195 U. S. 171.

In the present case, the receiver filed a petition reciting that he had taken possession of the property. This was denied. The District Court adjudged that the receiver had not at the time of filing its petition the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and had possession. Nevertheless it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale.

The sale in the circumstances did not change the situation. The proceeds stood in place of the property and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits. The Court of Appeals sustained the jurisdiction of the District Court upon the ground that it had acquired a fund and had jurisdiction to dispose of it, but we do not think that a court of bankruptcy can create a jurisdiction forbidden by statute. And in any view, the proceeding was a proceeding in bankruptcy. Being such, an

appeal from the decree of the District Court under section 25*a* did not lie, and parties aggrieved could only invoke the supervisory power under section 24*b*. *Holden* v. *Stratton*, 191 U. S. 115; *Hutchinson* v. *Otis*, 190 U. S. 552.

But this was an appeal and not a petition for revision, and hence it was that the Circuit Court of Appeals reviewed the questions of fact and declined to accept the findings of the referee and the District Court. In the exercise of supervisory power, it would have been confined to matter of law. We are clear that an appeal would not lie, and the decrees of the Circuit Court of Appeals must be reversed, with a direction to dismiss the appeals and remand the cause to the District Court for further proceedings in conformity with this opinion.

In our view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made.

Ordered accordingly.

True copy.

Test:

Clerk Supreme Court, U. S.